

S.C. 20216

JIM FEEHAN	:	SUPREME COURT
v.	:	STATE OF CONNECTICUT
RICK MARCONE, ET AL.	:	FEBRUARY 11, 2019

MOTION FOR REARGUMENT AND/OR RECONSIDERATION

"[The courts are] legally trained and I would suggest probably far more disciplined as a result. They are not political. They're impartial. And they are distant from the decisions that they're making. None of those things apply to us. We are a body that's valued for being passionate and sometimes parochial. We are a political body elected on two year cycles. We organize ourselves by political party..."

Representative Gregory Haddad (D), Committee on Contested Elections Meeting (2/1/19) (available at <https://ct-n.com/ondemand.asp?ID=15977> at 17:00) (explaining why, despite the established and undisputed facts, Democrats still refuse to call for a new election contrary to Connecticut case law requiring one).

Pursuant to Practice Book §§ 60-2 and 71-5, the plaintiff-appellant, Jim Feehan, moves this Court for reargument and/or reconsideration. In its January 30, 2019 slip opinion, the Court stated that, although it was staying its hand, judicial intervention in this legislative election dispute would be proper if the House Committee were to violate the plaintiff's constitutional rights. Feehan v. Marcone, at p. 26, n.27. In light of the House Committee's proceedings, which violated the constitutional right to due process, and the Committee's report, which violated the constitutional right to equal protection, judicial intervention is needed.

A four member bipartisan House Committee conducted an investigation that resulted in a unanimous finding that 75 people were given the wrong ballots and denied the right to vote in an election decided by 13 votes.¹ Given that finding, the next step should have been

¹ The members were Representative Michael D'Agostino (D), Representative Gregory Haddad (D), Representative Vincent Candelora (R), and Representative Jason Perillo (R). The House Committee's report is appended to this motion.

straightforward – a new election. Nonetheless, after the investigation was completed, the two Democrats on the Committee refused to call for a new election, without regard to deprivation of the constitutional rights of due process, equal protection, and political participation. The two Republican members applied and followed the settled Connecticut case law and noted that, since the allegations in the Complaint were confirmed, a new election must be held. The Democrats' actions violated the constitutional right to due process by (a) failing to provide adequate (or any) notice that Connecticut case law would be disregarded and substituted with a new and impossible burden requiring proof of how those 75 voters would have voted and (b) creating an impossible burden that would require violating voter secrecy laws. The Democrats further violated the right to equal protection because, if Feehan were a candidate for any other office in the State, he would have been received a new and fair election.

The facts underlying this dispute were clearly established in the proceedings before the House Committee. Once those facts were established, this Court expected that the members of the House would honor their oaths and hold a new election. They failed to do so. The constitutional rights of Feehan and of the voters of the 120th Assembly District are now dependent on this Court honoring its obligation to protect those rights. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163-164 (1803) (every right must have a remedy).

I. BRIEF HISTORY OF THE CASE

On November 6, 2018, 76 voters² were denied the right to vote for their state representative in the 120th Assembly District, and the candidates' vote totals were separated by 13 votes. On November 15, 2018, Feehan filed this case seeking a new and fair election. On November 30, 2018, the trial court (*Bellis, J.*) agreed that, if the allegations set forth in Feehan's complaint were true, there was a high likelihood of success on the merits of his claim

² The complaint alleged that 76 voters were given the wrong ballots. The Committee members found that 75 people were given the wrong ballots.

(i.e. that a new election was required). T.11/30/18 at 20-21 (“[G]iven the serious allegations with respect to the incorrect ballots distributed during the election, the number of voters who were deprived of their constitutional rights to vote, and the margin by which the plaintiff lost the election, the plaintiff has demonstrated that he is likely to prevail on the merits of his underlying claim.”) However, the trial court concluded that it was for the House to hear Feehan’s claim. T.11/30/18 at 17-18. The court granted Feehan’s request to enjoin the state defendants from certifying the election and from declaring a winner. T.11/30/18 at 21. The court granted Young’s motion to dismiss the plaintiff’s request for a new election, concluding that the Feehan’s remedy was before the House of Representatives. T.11/30/18 at 17-18.

On December 7, 2018, the Chief Justice granted General Statutes § 52-265a applications for this expedited public interest appeal. The Court scheduled oral argument for December 21, 2018. At the conclusion of argument, this Court issued the following order:

After a hearing and based on the record and claims before the Court, it is hereby ordered that the judgment of the trial court is affirmed insofar as it lacks jurisdiction at this time. In accordance with this determination, it is further ordered that the trial court’s injunction is vacated. A written decision will follow.

(Emphasis added.) Supreme Court Order, S.C. 20216, 20217, 20218 (12/21/19).

On January 31, 2019, this Court released its written decision. In that decision, this Court noted its trust that a new election would be held if the factual allegations were proven:

We are, however, cognizant of the seriousness of the plaintiff’s allegations in this case, insofar as the alleged distribution of the wrong ballots could have deprived numerous electors of their right to cast a vote for their state representative, and that the margin was small enough that the alleged error might have affected the outcome of the election. Given the seriousness of those claims, and its exclusive jurisdiction under the elections clause, we must presume that the members of the General Assembly will carry out their duties with scrupulous attention to the laws under which they serve...

See Feehan v. Marcone, at 25. The Court further noted that, although it was staying its hand, it had the authority to intervene if the House Committee’s actions violated the constitution,

such as the right to due process. See id. at p. 26, n.27.

II. SPECIFIC FACTS RELIED UPON

The House of Representatives opened its session on January 9, 2019. The House adopted House Resolution 4, which raised a Committee on Contested Elections.³ On January 11, 2019, the Committee convened and, at its request, Feehan filed an Election Challenge Complaint. The allegations in the Complaint were straightforward and the final paragraph set forth the controlling standard based established Connecticut case law:

Where a sufficient number of voters are given the wrong ballots so as to call into question the reliability of the election, Connecticut law requires that a new election be held. See Exhibit 10 (Rutkowski v. Marrocco, 2013 WL 6916610 (Conn. Super. Ct. 2013) (Sheridan, J.) (applying standard set by Supreme Court in Bortner v. Town of Woodbridge, 250 Conn. 241, 259 (1999) and ordering a new election where 17 voters received the wrong ballots in an election decided by 3 votes).

Election Challenge Complaint, par. 23.⁴ Nothing was filed in response to Feehan's complaint and there was no controversy over the standard.⁵

On January 11, 2019, the Committee discussed the procedure it would implement for its investigation and report. The Committee sought "suggestions" from the candidates as to witnesses it should call. But, as made clear in House Resolution 4, it was the Committee and, specifically the Chair of the Committee, who was authorized to call witnesses. The Committee

³ House Resolution 4 states: "That the committee on contested elections, appointed pursuant to Rule 19 of the House Rules, report to the clerk of the House, on or before the close of business on February 4, 2019; that the Speaker of the House appoint the chairperson of the committee; that the chairperson of the committee have the power to compel the attendance and testimony of witnesses by subpoena, require the production of any necessary records, books, papers or other documents, and to administer oaths to witnesses before the committee; and that the joint committee on legislative management provide to the committee on contested elections such staff and facilities, including administrative personnel, supplies and equipment, that the committee on contested elections may require to discharge its duties."

⁴ All filings and transcripts of proceedings before the Committee are available at: [https://www.cga.ct.gov/gae/taskforce.asp?TF=20190109_Contested Elections Committee](https://www.cga.ct.gov/gae/taskforce.asp?TF=20190109_Contested%20Elections%20Committee)

⁵ The Chairman (D'Agostino) expressly recognized Connecticut case law and the Bortner standard at the start of the Committee's proceedings. See 1/11/19 Committee Meeting.

held hearings to investigate the allegations in the Complaint on January 24th and 25th. It subpoenaed and heard testimony from witnesses who confirmed the facts alleged in the Complaint as well as the accuracy of the exhibits submitted in support of those allegations (Feehan's Exhibits 1-6). The most significant fact conclusively established was this – 75 voters in the 120th Assembly District were not given ballots listing the candidates for their state representative and the margin between the candidates was 13 votes.

On February 1st, the Committee discussed preparation of their report. Faced with the now established fact that 75 people were given the wrong ballot, the Democratic members changed the standard required for a new election and imposed a new and impossible burden of proof on Feehan, which did not exist when the proceedings started. On February 4th, the Committee issued its report. The members agreed that the facts alleged in the Complaint were proven. Committee Report p. 1-9. However, the Democrats imposed a new burden, that was not set forth at the beginning of the proceedings, requiring Feehan to prove how many of the 75 voters who received the wrong ballot would have voted for Feehan. After declaring this new burden of proof, the Democrats proclaimed that Feehan had failed to meet this burden and that the Complaint should be dismissed. Committee Report p. 15-19.

The Republican members noted that, based on the established facts, settled Connecticut law mandated a new election and that the Democrats' new burden of proof had been expressly rejected by this Court:

[W]e bind ourselves to the same judicial precedents and principle of *stare decisis* as we would were we the Judicial Branch. Consideration of this matter by the House is merely a change in forum, not a change in law, standard, or applicable precedent. The standard of review laid out by the Connecticut Supreme Court in election disputes such as these is found in *Bortner v. Town of Woodbridge*, 250 Conn. 241 (1999). In order to overturn the results of an election and order a new election the following must be found:

(1) There were substantial errors in the rulings of an election official or officials, or substantial mistakes in the count of the votes; and

(2) As a result of those errors or mistakes, the reliability of the result of the election is seriously in doubt.

We further note that Supreme Court precedent established by *Bortner*, further affirmed and amplified by *Bauer v. Souto*, 277 Conn. 829 (2006), explicitly rejects the notion that a challenger must establish that, but for the irregularities, he would have prevailed in the election.

As the *Bortner* standard has been satisfied, we see no other option than for the House of Representatives to order a new election. We do not take this step lightly, and are aware of the judicial and legislative history counseling caution before exercising its power to vacate election results. But similar to the Supreme Court in *Bauer*, given the facts properly found in the challenge before us, we have no other reasonable choice but to do so.

Although we are aware that a new election is really a *different* election, we follow the Supreme Court's guidance in *Bauer*. In *Bauer*, the Court ruled that the new election should attempt to "minimize, rather than to maximize, the differences between the first and new election. Put another way, the new election should be the result of an effort to approximate, as closely as is reasonably possible, the first election." We agree, and recommend that the new election should field the same slate of candidates (Rep. Young, Feehan, and Palmer), and operate with the same policies and procedures of a typical election, as is mandated by valid precedent of the Connecticut Supreme Court.

Committee Report p. 20-21, 25.

III. LEGAL GROUNDS RELIED UPON

This motion is brought pursuant to the fourteenth amendment to the federal constitution, article first, § 10 of the state constitution, and Practice Book §§ 60-2 and 71-5.

IV. ARGUMENT

Reconsideration and/or reargument is required because this Court's decision to defer to the House to resolve this case was based on this Court's assumption that Feehan's constitutional rights would not be violated through that process. Now that the matter has proceeded to the House Committee, and Feehan's due process and equal protection rights were violated (and the rights of the disenfranchised voters of the 120th remain impaired), this Court must grant this motion, reconsider its decision, and order a new election.

A. The Plaintiff's Due Process Rights Were Violated

Feehan's right to due process was violated when the Democratic members changed the rules at the end of the proceedings. Neither the legislature, nor the judiciary, nor the legislature acting as a judicial body, may retroactively change the law to deny a claim.

Due process requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," and that is "of such nature as reasonably to convey the required information." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Due process is violated where the notice is misleading or lacks information regarding the applicable rules or procedures. See Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1978) ("The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'"); Rodriguez v. Astrue, 2013 WL 12329109 (D.N.M. Sept. 12, 2013) (due process violation where notice to Social Security applicant contained legal standard that was not used by hearing officer (citing Rolen v. Barnhart, 273 F.3d 1189, 1191 (9th Cir. 2001))).

By changing the standard from proving the allegations set forth in the Complaint to proving how voters would have voted, the Democrats violated the right to due process. See Consol. Edison Co. of New York, Inc. v. F.E.R.C., 315 F.3d 316, 323 (D.C. Cir. 2003).

1. The settled law at the time of this election

Rutkowski v. Marrocco, 2013 WL 6916610 (Conn. Super. Ct. 2013) (*Sheridan, J.*) explains the legal standard for a new election and its application when incorrect ballots are distributed which cast doubt on the reliability of the election. In Rutkowski, incorrect ballots were distributed to voters at the polling location for Voting District Number 14 in Ward 5 of the City of New Britain. The court followed the standard set forth in Bortner v. Town of

Woodbridge, 250 Conn. 241 (1999) to order a new election. A new election is required when there is: (1) an error or errors in the rulings of an election official, or a mistake in the count of the votes and (2) that those errors or mistakes cast serious doubt on the reliability of the election results. Bortner, 250 Conn. at 259, 263. After determining that the election officials committed errors and that there was a substantial mistake in the count of the votes in Ward 5 (thus satisfying both of the criteria under Bortner) the court held that there was serious doubt about the reliability of the election results. Given the three vote difference between the plaintiff and defendant candidates, if the seventeen voters had the opportunity to vote in the correct election, the outcome of the election could have been different.

The present case is no different than Rutkowski. Thus, all that was necessary for a new election was proof that 75 people were given the wrong ballots in an election decided by 13 votes. Under the Connecticut legal standard for a new election, as explained in Bortner, a new election in the 120th Assembly District is required as a matter of law.

2. Retroactive changing of the standard violated due process

As discussed above, the Democrats' retroactive changing of the standard and burden to require proof of how the 75 voters would have cast their votes was a clear due process violation. This is a particularly troubling violation in the context of elections, where "fundamental fairness" is essential to protecting the integrity of the electoral process and the constitutional rights of the electors to vote and have their votes counted equally. See Roe v. State of Alabama, 43 F.3d 574, 580–81 (11th Cir. 1995); see also Griffin v. Burns, 570 F.2d 1065, 1075 (1st Cir.1978) (changing rules for absentee ballots after election violated due process). Here, not only did the Democrats add a new burden, the standard they retroactively applied has been expressly disavowed by this Court. See Bauer v. Souto, 277 Conn. 829, 840 (2006) (explaining that under Bortner, candidate is not required to show that he would have prevailed in the election and rejecting claim to the contrary as "utterly without merit").

3. The Democrats' retroactive standard is arbitrary and capricious

The Democrats acted arbitrarily in faulting Feehan for not presenting testimony from voters as to how they would have voted. First, pursuant to House Rule 19, it was the chairperson's duty and ability to compel testimony from any witnesses deemed necessary. Feehan had no subpoena power. Feehan provided a complaint, with the facts needed to meet this Court's standard for a new election. See Complaint, ¶¶ 1-23. Feehan suggested witnesses who could confirm the facts alleged in the Complaint. A53. If the Democratic chairman genuinely required additional facts or evidence other than those set forth in the Complaint, it was his obligation and authority - indeed, his sole authority - to obtain them. Having decided not to do so, it is now disingenuous to fault Feehan for not presenting testimony from voters.

The decision to place this burden on Feehan is even more ludicrous when one considers that he would need to violate state law in order to meet it. The state constitution expressly provides that "[t]he right of secret voting shall be preserved." Connecticut Constitution, Article Sixth, section 5; see also General Statutes § 9-242(a). In fact, it is a felony offense to invade the secrecy of voting. See General Statutes § 9-366 ("Any person who... does any act which invades or interferes with the secrecy of the voting or causes the same to be invaded or interfered with, shall be guilty of a class D felony.").⁶

Because the burden created by the Democrats is impossible and illegal to meet, it is an arbitrary and capricious standard that violates due process and requires this Court's

⁶ The Democrats state in their report that voters could have testified voluntarily. This argument highlights the due process problem with their position. How could Feehan's constitutional right to a fair election depend on voters waiving their own constitutional right to secrecy? And how would those individuals even be identified without violating CGS § 9-366 and committing a crime? The Democrats also suggest that a statistician could have testified. It would have been well-nigh impossible for a statistician to divine how the 75 people would have voted (after all, this is why we have elections rather than relying on polls in the first place). Nonetheless, if the chairman wanted to hear from a statistician, he could have called one. He chose not to. It violates due process for him to now use his own decision to deprive Feehan of a fair election.

intervention. See Barry v. United States ex rel. Cunningham, 279 U.S. 597 (1929) (while Congress has power to resolve elections dispute, judicial invention is proper to remedy arbitrary and improvident use of the power that results in a denial of due process).

B. The Plaintiff's Equal Protection Rights Were Violated

In addition, Feehan's equal protection rights were violated and the rights of the 75 voters to cast an equal vote remain impaired. If Feehan had been a candidate for any other office, and these same facts were established, a new election would have been ordered. See Bortner, Bauer, Rutkowski. By failing to apply the same standard in determining whether a new election should be held, the Democratic members violated the equal protection clause.

In addition, the process employed discriminated against Feehan as a Republican (and, therefore, non-majority party) candidate. The Second Circuit has recognized that a system that discriminates on the basis of political party affiliation violates the equal protection clause. See Green Party of Connecticut v. Garfield, 616 F.3d 213, 229 (2d Cir. 2010) ("whether the system burdens the political opportunity of a party or candidate in a way that is unfair or unnecessary."); see also Keating v. Carey, 706 F.2d 377 (2d Cir. 2006) (holding that political party affiliation can be protected class).

The procedure that was employed in this matter, which resulted in the Democrats changing the law, standards, and burden in order to deny Feehan his constitutional right to a fair election, is a violation of the equal protection clause.

IV. CONCLUSION

This Court stayed its hand to allow the House Committee to act. It has now done so and violated the constitutional rights to due process and equal protection. This Court must grant reconsideration and/or reargument to protect those constitutional rights and, based on the now established and undisputed facts, order a new election in the 120th Assembly District.

Respectfully Submitted,

THE PLAINTIFF,

JIM FEEHAN

By:



Proloy K. Das, Esq.

Matthew A. Ciarleglio, Esq.

Kevin W. Munn, Esq.

Murtha Cullina LLP

185 Asylum Street

Hartford, Connecticut 06103

Telephone: 860.240.6000

Facsimile: 860.240.6150

pdas@murthalaw.com


CERTIFICATION

I hereby certify that this motion complies with the provisions of Practice Book § 66-3 and that a copy of this motion pursuant to Practice Book §62-7 was mailed, via first-class mail, postage pre-paid on this 11th day of February, 2019 to:

William Bloss, Esq.
Koskoff, Koskoff & Bieder
350 Fairfield Avenue
Bridgeport, CT 06604

Michael Skold
Office of the Attorney General
55 Elm Street
Hartford, CT 06141

Lawrence Sgrignari
Gesmonde, Pietrosimone & Sgrignari, LLC
3127 Whitney Avenue
Hamden, CT 06518



Proloy K. Das